

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

FRANCIS HORIEL and CROWN  
CREATIONS CABINETMAKERS,  
INC.,

Plaintiffs,

vs.

BURLINGTON NORTHERN  
AND SANTA FE RAILWAY  
COMPANY, a foreign corporation,  
f/k/a BURLINGTON  
NORTHERN, INC., and  
BURLINGTON NORTHERN  
RAILROAD COMPANY, a  
Delaware Corporation,

Defendants.

CV-08-135-BLG-RFC-CSO

**FINDINGS AND  
RECOMMENDATION OF  
UNITED STATES  
MAGISTRATE JUDGE**

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At a scheduling hearing held on June 28, 2012, the Court and counsel discussed, among other topics, Defendants' pending motion to dismiss. Defendants filed the motion more than two and a half years ago – on November 13, 2009. *DKT 21*. The case had been stayed for a significant portion of the time since the motion's filing, and was only recently referred to the undersigned for pretrial management. *See DKTs 45, 51, and 52.*

At the scheduling hearing, the Court advised Defendants'

counsel that it was inclined to recommend that the motion to dismiss be denied because of developments since it was filed and fully briefed, including: (1) potentially relevant developments in data gathering and expert analysis; (2) developments in other actions involving facts and claims similar to those involved in this action; and (3) the Montana Supreme Court's answer to Chief Judge Cebull's certified question in cases CV 07-147-BLG-RFC, CV 07-148-BLG-RFC, and CV 08-30-BLG-RFC.

The Court suggested to Defendants' counsel that it might also be appropriate for Defendants to withdraw the pending motion and refile it before the motions deadline established at the scheduling hearing. Defendants' counsel indicated that the motion would be withdrawn.

To date, Defendants have not withdrawn the motion. Accordingly, for the reasons stated herein and on the record of the scheduling hearing held on June 28, 2012, IT IS RECOMMENDED that Defendants' motion to dismiss (*DKT 21*) be DENIED, without prejudice to refile before the deadline for filing motions.

NOW, THEREFORE, **IT IS ORDERED** that the Clerk shall serve a copy of the Findings and Recommendation of United States Magistrate Judge upon the parties. The parties are advised that

pursuant to 28 U.S.C. § 636, any objections to the findings and recommendation portion of this document must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

DATED this 9<sup>th</sup> day of July, 2012.

/s/ Carolyn S. Ostby  
United States Magistrate Judge